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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 400

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL 415, *et al.*

Petitioners,

v.

SCHERER & SONS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	9
Conclusion	13
Appendix A	A 1
Appendix B	B 1

TABLE OF CASES CITED

De Vries v. *Baumgartner's Electric Construction Co.*, 359 U. S. 498 9

Employing Lithographers of Greater Miami v. *NLRB*, 301 F. 2d 20 11

Farnsworth and Chambers Co. v. *Local Union 429*, 353 U. S. 969 9

Garner v. *Teamsters Union*, 346 U. S. 485 9

Hescom, Inc. v. *Stalvey*, 155 So. 2d 3 ..... 7, 8

Kitchens v. *Doe*, 172 So. 2d 896, 194 So. 2d 258 ..... 6, 7, 8, 10

PAGE

Local No. 438 v. *Curry*, 371 U. S. 542 .....6, 7, 9

NLRB v. *Amalgamated Lithographers of America*, 309 F. 2d 31, cert. den. 372 U.S. 943 11

NLRB v. *Scherer & Sons, Inc.*, 370 F. 2d 12, cert. pending, No. 1397, Oct. Term, 1966 6

Retail Clerks International Ass'n v. *Schermerhorn*, 375 U.S. 96 .....6, 7, 8, 9, 10, 12

Scherer & Sons, Inc. v. *International Ladies' Garment Workers' Union, Local No. 415*, 341 F. 2d 298, cert. den. 382 U.S. 820 ..... 5, 6

Truck Drivers Local No. 413 v. *NLRB*, 334 F. 2d 539 11

STATUTES CITED

Florida Constitution

Article 5, Section 4 8
Section 12, Declaration of Rights 4, 6, 7

Florida Statutes, Section 542.05 4

National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, *et seq.*

Section 8(e) 6, 11, 12
Section 14(b) 9, 10, 12

IN THE

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No.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL 415, *et al.*

Petitioners,

v.

SCHERER & SONS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners respectfully pray that a writ of certiorari issue to review the order of the Supreme Court of Florida entered in the above entitled case on February 20, 1967, dismissing the appeal to that court.

Opinions Below

The order of dismissal of the Supreme Court of Florida is unreported. The opinion of the District Court of Appeal is reported in 188 So. 2d 380. The final decree of the circuit court and its order denying rehearing are unreported.

There are also earlier opinions in this case as follows: District Court of Appeal, reported in 163 So. 2d 306; Supreme Court of Florida, reported in 142 So. 2d

290, implemented by decision of District Court of Appeal, reported in 146 So. 2d 137; and District Court of Appeal, reported in 132 So. 2d 359.

For the convenience of the Court, the opinions are reprinted in Appendix A, *infra*, pp. A 1-41.[1]

Jurisdiction

The order of dismissal of the Supreme Court of Florida (*infra*, p. A 1) was entered on February 20, 1967. By orders of Mr. Justice Black, the time for filing a petition for writ of certiorari was extended to June 22, 1967, and then to July 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

Questions Presented

1. Whether the Florida state courts are barred by controlling preemption decisions of this Court from issuing an injunction, under its "right-to-work" law, enjoining peaceful picketing and banning enforcement of a garment industry contractual provision which forbids work to be contracted to non-union shops.

2. Whether the garment industry's exemption contained in Section 8(e) of the National Labor Relations Act may be superseded by a state "right-to-work" law.

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[1] We have not reprinted 146 So. 2d 137, wherein the District Court of Appeal merely modified its mandate to conform to the Supreme Court decision in 142 So. 2d 290.

Statutes Involved

The pertinent provisions of the National Labor Relations Act and of the Florida Constitution are set forth in Appendix B, *infra*, pp. B 1-4.

Statement

In 1957, Local 415 of the International Ladies' Garment Workers' Union, AFL-CIO (the Union), entered into a collective bargaining agreement with the Florida Apparel Manufacturers' Association (R. 27-50, 291, 294, 311). On October 25, 1960, the agreement was modified and renewed by a Supplemental Agreement (R. 23-26, 213-216, 250, 291). Paragraph 6 of the Supplemental Agreement provided as follows (R. 25, 215-216):

> "6. Belts, covered buttons, buckles, neckwear, artificial flowers, embroideries, hemstitching, pleating and tucking on garments, etc., which are caused by members of the Association to be manufactured for them shall be made only by workers covered by collective bargaining agreements with the Union, the International or affiliates thereof. In case a member of the Association shall have this work done by a non-union shop, then, upon notification by the Union of this fact, the Employer shall discontinue to give out such work to such non-union shop or shops."

The Union demanded and secured this provision "to make sure that * * * working conditions are at a level" which would "defend the standards of our members" (R. 293-294).

Scherer & Sons, Inc. (Scherer) is a non-union manufacturer of belts, buttons and accessories (R. 256, 337, 391). When some Association members continued to subcontract belt and accessory work to Scherer despite the prohibition in the Supplemental Agreement, the Union threatened to invoke the agreement against them unless they desisted (R. 149, 152, 229, 230, 300, 407). Thereupon, on February 10, 1961, Scherer instituted the instant suit in the Florida state courts under the state antitrust statutes, Florida Statutes, Section 542.05 (R. 15-18). Scherer promptly secured an injunction against the attempted enforcement of Paragraph 6 (R. 57-58) which remained in effect for a year and a half until it was overturned by the District Court of Appeal, 132 So. 2d 359 (R. 72-74, *infra*, pp. A 29-31) and the Supreme Court of Florida, 142 So. 2d 290 (R. 81-90, *infra*, pp. A 18-28).

Both appellate courts held that, since interstate commerce was concededly involved (R. 303, 306-307), the subject matter of the suit under the state antitrust statute was preempted by the National Labor Relations Act.

The Florida Supreme Court did not, however, order dismissal of the complaint. Instead it remanded the case to the courts below to determine whether relief should be granted under Florida's so-called "right to work amendment" found in Section 12, Declaration of Rights, Florida Constitution (*infra*, p. B 3).[2] The Supreme Court stated (142 So. 2d, at 295; *infra*, p. A 27):

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[2] The District Court of Appeal conformably modified its mandate to embody the remand, 146 So. 2d 137.

> "Conceivably, the secondary economic pressures exerted upon appellant by the disputed provision in the collective bargaining agreement could force appellant into a dilemma which would be tantamount to a taking of its property without due process. It could be confronted by a situation where the only alternative to preserving itself against irreparable harm would be the compulsion to require its employees to join a union as a condition to employment. Such compulsive pressures would then squarely present the Florida "right to work" issue. Certainly, if this situation could be supported by evidence upon a remand, then the Taft-Hartley recognition of permissible state concern in the enforcement of its right-to-work provisions would support state action. In the area of protecting state policy under right-to-work provisions the Congress has expressly ceded initial jurisdiction to the states."

The injunction having been thus vacated by the Florida Supreme Court, the Union in October 1962 again attempted to enforce Paragraph 6 (R. 150, 151, 153, 227, 228, 231, 332, 346). At this point Scherer countered in a number of ways. First, it commenced another antitrust suit attacking Paragraph 6, this time in the United States district court, on a claim of Sherman Act violation. The suit was ultimately defeated.[3] Second, in addition to the federal suit, it filed unfair labor practice charges against the Union with the National Labor Relations Board, based on

[3] The district court dismissed the complaint after trial, and its decision was affirmed by the Fifth Circuit, 341 F. 2d 298. This Court denied certiorari, 382 U. S. 820, No. 188, October Term, 1965.

the execution and attempted enforcement of Paragraph 6. These charges were dismissed, the determination being based in part on "the impact of the second [garment industry] proviso to Section 8(e) of the Act" (R. 114).[4] And third, as permitted by the remand from the Florida Supreme Court, Scherer amended its state court complaint to allege a violation of the Florida "right-to-work" provision of the state Constitution (R. 92-94, 99).[5]

But before the "right-to-work" complaint could be brought to trial, two definitive decisions of this Court supervened, *Local No. 438* v. *Curry*, 371 U. S. 542; *Retail Clerks International Ass'n* v. *Schermerhorn*, 375 U. S. 96. Upon these controlling authorities, the Union moved to dismiss the complaint and the trial court granted the motion (R. 109, 112, 324, 326). The District Court of Appeal, however, ignoring the *Curry* and *Schermerhorn* decisions, reversed, stating that the court below had "erred in failing to adhere to the decision of the Supreme Court of Florida" which had

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[4] The relevant papers are printed as part of Scherer's reply brief in the Fifth Circuit and certified to this Court at Scherer's instance in No. 188, October Term, 1965.

[5] Even this does not exhaust Scherer's bag of litigation. At an earlier stage it ordered and induced its workers to commence a group injunction suit against Union picketing, *Kitchens* v. *Doe*, the action being entitled in the name of a floorlady, Nellie Kitchens. Scherer supplied its own counsel to represent the employees without charging them any fee. The ultimate result of this litigation is discussed *infra*, pp. 7-8.

Upon charges filed with the National Labor Relations Board against Scherer based on its coercion of workers to join in the *Kitchens* lawsuit, the Board found a violation of the Act. The court of appeals enforced the Board's remedial order with certain modifications, 370 F. 2d 12 (C. A. 5), and the matter is now pending before this Court on Scherer's petition for certiorari, No. 1397, October Term, 1966.

become "the 'law of the case'" (163 So. 2d 306, R. 177, *infra*, p. A 17).

The case then proceeded to trial (R. 318-410), and on March 12, 1965, the court entered a final decree in favor of Scherer (R. 197, *infra*, pp. A 11-14). As had the District Court of Appeal on the prior appeal, the court now disregarded the *Curry* and *Schermerhorn* cases, considering itself bound by "the law of the case in this cause of action, as is defined and set out in 142 So. 2d 290 and 163 So. 2d 306" (*infra*, p. A 12). It concluded that enforcement of "the contract which is the subject matter of this suit" [Paragraph 6, *supra*, p. 3] constituted illegal "economic pressures" to compel Scherer "to execute a contract" with the Union and "require [its] employees to join" the Union; and that this violated the "right-to-work" provision of the Florida Constitution (*infra*, pp. A 12-13). The court not only enjoined enforcement of Paragraph 6, but also enjoined peaceful picketing as violative of the "right-to-work" provision (*infra*, pp. A 13-14).[6]

Meanwhile, the aforementioned *Kitchens* case, the Scherer-induced "employee" suit to enjoin Union picketing as violative of the "right-to-work" provision (*supra*, p. 6, n. 5) reached the District Court of Appeal. In this case, unfettered by any "law of the case" considerations, the District Court of Appeal proceeded to hold that the *Schermerhorn* decision of this Court had superseded the Florida Supreme

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[6] The court cited in support an earlier Florida decision, *Hescom, Inc.* v. *Stalvey*, 155 So. 2d 3 (*infra*, p. A 12). Compare p. 8, *infra*.

Court's contrary views in the *Scherer* case. It accordingly decided that preemption applied and required the dismissal of the *Kitchens* complaint. 172 So. 2d 896 (*infra,* pp. A 37-41). In so doing, it also held that the Florida *Hescom* case (*supra,* p. 7, n. 6) "must be deemed overruled by the later Schermerhorn case" (*infra,* p. A 41).[7]

Relying on the *Kitchens* decision, the Union sought rehearing of the instant case in the trial court (R. 196-201). Rehearing was denied (R. 217-219, *infra,* pp. A 6-10). The Union then appealed to the same District Court of Appeal which had just decided the *Kitchens* case in its favor. But this time the District Court of Appeal, making no mention of *Kitchens* and totally ignoring preemption and the *Schermerhorn* case, simply quoted from and affirmed the decision of the trial court (188 So. 2d 380, *infra,* pp. A 2-5). It also cited approvingly the very *Hescom* case which not long ago it had held to be "overruled by the later Schermerhorn case".

The Union's further appeal to the Supreme Court of Florida was dismissed on February 20, 1967 (*infra,* p. A 1).[8]

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[7] The Supreme Court of Florida subsequently dismissed an appeal in the *Kitchens* case, 194 So. 2d 258 (*infra,* pp. A 32-36).

[8] The jurisdiction of the Supreme Court to hear the appeal under the Florida Constitution seems plain (*infra,* p. B 4; see also p. A 33).

Reasons for Granting the Writ

1. The decision below flies directly in the face of the preemption decisions of this Court from *Garner* v. *Teamsters Union*, 346 U. S. 485, onward. In the *Garner* case, as here, the "courts below found" that the "purpose" of the union's peaceful activity "was to coerce [the employers] into compelling or influencing their employees to join the union" (346 U.S., at 487). Nevertheless, this Court held that the National Labor Relations Board had exclusive jurisdiction over the controversy and that the state courts were preempted from acting.

The *Garner* case arose in a commonwealth which had no "right-to-work" law enacted pursuant to Section 14(b) of the National Act (*infra*, p. B 3), but this Court has applied exactly the same doctrine in states which do have such laws, overturning judgments which sought to rest state jurisdiction thereon. *Farnsworth and Chambers Co.* v. *Local Union 429*, 353 U. S. 969, reversing 201 Tenn. 329; *Local No. 438* v. *Curry*, 371 U. S. 542, reversing 217 Ga. 512; *cf. DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U. S. 498, reversing 77 S. D. 273. In *Retail Clerks International Ass'n* v. *Schermerhorn*, 375 U. S. 96, the Court spelled out the distinctive point at which state right-to-work jurisdiction first comes into play. It held (at p. 105):

> "state power, recognized by § 14(b), begins *only with actual negotiation and execution of the*

> *type of agreement described by § 14(b).* Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board". (italics in original)

In the instant case there is no suggestion that the Union ever negotiated or executed the type of agreement described by Section 14(b), i.e., one requiring Union membership as a condition of employment.[9] In these circumstances, the instant decision flatly conflicts with *Schermerhorn* and the other cited decisions of this Court.

Indeed the District Court of Appeal itself recognized in the *Kitchens* case that *Schermerhorn* required dismissal of that complaint, despite the earlier conflicting view of the Florida Supreme Court in the first round of the *Scherer* case (*supra,* pp. 7-8). Yet some misguided notion of "law of the case", in disregard of the Supremacy Clause, caused the court in the instant case to defer to the Florida Supreme Court instead of following this Court's controlling view. It thereupon issued an injunction, under the "right-to-work" law, enjoining peaceful picketing and banning enforcement of the contractual provision which forbids work to be contracted to non-union shops. The judgment below plainly collides with the authoritative decisions of this Court and disregards

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[9] The only agreement ever submitted to Scherer, years before this litigation began, was one on which no negotiations ever took place and which did *not* require membership as a condition of employment unless "State Law permits" (R. 234, 341-342, 348-352, 392-393, 394-395, 398).

the preemption doctrine which divests the state of jurisdiction.

2. If the decision below is permitted to stand, then the garment industry exemption from the hot cargo prohibitions of Section 8(e) of the National Act will be null and void in Florida. It will have been ousted by the state's "right-to-work" law. The same result would seem to follow in other "right-to-work" states. This cannot be reconciled with the Congressional purpose.

For decades before 1959, when Congress passed the Landrum-Griffin amendments to the National Labor Relations Act, the garment industry agreements contained provisions that a union employer must confine his production to union factories and not divert them to non-union sources lest they undermine and destroy the standards in the union factories. Congress in 1959 clearly intended to preserve the legality of such provisions. As the Fifth Circuit has said, it was the "intent and design of Congress to protect an industry peculiarly subject to poor working conditions", one which "was formerly a sweat shop industry", and one in which "vast improvement in working conditions * * * was brought about through agreements between jobbers and the unions requiring the jobbers to farm out their work only to contractors operating on union standards", lest there be "havoc". *Employing Lithographers of Greater Miami* v. *NLRB*, 301 F. 2d 20; see also *NLRB* v. *Amalgamated Lithographers of America*, 309 F. 2d 31 (C.A. 9), cert. den. 372 U. S. 943; *Truck Drivers Local No. 413* v. *NLRB*, 334 F. 2d 539 (C.A. D.C.).

There is not the slightest intimation in the legislative history that Congress intended the garment industry exemption to apply in the rest of the United States, but desired "havoc" in Florida and the other "right-to-work" states.

The simple fact is that Section 14(b) of the National Act, and appropriate "right-to-work" laws enacted pursuant to its authority, have nothing to do with the garment industry exemption nor, for that matter, with the basic hot cargo prohibitions of Section 8(e). It is the National Labor Relations Board under the National Act, not the states under their "right-to-work" laws, which has exclusive authority to define, apply and enforce the prohibitions and protections embodied in Section 8(e). Indeed, in the instant situation, as has been mentioned, Scherer did turn to the Board for relief, and its unfair labor practice charges were dismissed, the Board citing the garment industry proviso as one reason (*supra,* pp. 5-6). The State of Florida has no authority to supersede this determination through a distorted use of its "right-to-work" law.

The only proper use of the state's "right-to-work" law is to ban "actual negotiation and execution of the type of agreement described by § 14(b)" (*Schermerhorn, supra,* p. 9)—i.e., an agreement "requiring membership in a labor organization as a condition of employment." There was no hint here of even a demand for—much less "actual negotiation and execution of"—the forbidden type of agreement. In these circumstances the state courts had no jurisdiction to issue an injunction banning the vital "union-work"

provisions which garment industry agreements have long contained.[10]

To preserve the garment industry exemption throughout the nation, as Congress intended, certiorari should issue to review the judgment below.

Conclusion

For the reasons stated, the writ of certiorari should be granted.

Respectfully submitted

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July 19, 1967

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[10] It might be added that in "right-to-work" states, while the Union's collective agreements do not contain provisions requiring membership as a condition of employment, and significant numbers of workers in the shops are sometimes non-union, the shops and workers are nevertheless "covered by collective bargaining agreements with the Union" (Paragraph 6, *supra*, p. 3), with the result that union manufacturers and jobbers can properly send work under their contracts to such shops. Stated another way, compulsory union membership and coverage by a collective agreement are two quite different things; only the latter is needed to satisfy the "union-work" provisions of the manufacturer's or jobber's agreement.

APPENDIX, A

Order of Supreme Court of Florida Dismissing Appeal—February 20, 1967—Unreported

IN THE SUPREME COURT OF FLORIDA

JANUARY-TERM, A. D. 1967

Monday, February 20, 1967

Case No. 35,644

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL 415, et al.,

Appellants,

vs.

SCHERER & SONS, INC., etc., et al.,

Appellees.

Upon consideration of appellee's motion to dismiss appeal, said motion is granted and it is ordered that the appeal be and the same is hereby dismissed.

Appendix A

Opinion of District Court of Appeal—June 28, 1966—188 So. 2d 380

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1966

Case No. 65-411

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL 415, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO; MIAMI JOINT COUNCIL OF THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO; all unincorporated voluntary associations, et al.,

Appellants,

vs.

SCHERER & SONS, INC., a Florida corporation, and the FLORIDA APPAREL MANUFACTURERS' ASSOCIATION, INC., a Florida corporation,

Appellees.

Opinion filed June 28, 1966.

An Appeal from the Circuit Court for Dade County, Hal P. Dekle, Judge.

Kaplan & Shapiro, for appellants.

Marchant, Perkins & Cook; Smith & Mandler, for appellees.

Before HENDRY, C.J., and PEARSON and CARROLL, JJ.

Appendix A

Opinion of District Court of Appeal—June 28, 1966—
188 So. 2d 380

PER CURIAM.

Scherer & Sons filed a complaint in the circuit court seeking damages against the appellants and an injunction to prevent them from enforcing any contract and entering into and agreeing to any agreement whereby Scherer & Sons is restricted in the full and free pursuit of its business.

This court previously reversed a temporary injunction order in this cause after finding that "because it has been made to fairly appear that the activities complained of constitute an unfair labor practice under the National Labor Relations Act the state jurisdiction must yield."[1] On certiorari, the Supreme Court approved our decision. However, the appellant therein asserted that the collective bargaining agreement collides with Florida's right-to-work amendment. The Supreme Court found that this aspect of the problem was neither urged by the complaint nor supported by the evidence presented on application for temporary injunction. The court did remand to this court with directions to remand to the circuit court for further proceedings to afford the appellant an opportunity to establish the applicability of Florida's right-to-work amendment, indicating that if this situation could be supported, then the Taft-Hartley recognition of permissible state concern in the enforcement of its right-to-work provisions would support state action.[2] The complaint, as amended, after remand was dismissed and we reversed.[3]

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[1] *International Ladies' Gar. Wkrs. U.* v. *Scherer & Sons, Inc.*, Fla. App. 1961, 132 So. 2d 359, 361.

[2] *Scherer & Sons, Inc.* v. *International Ladies Gar. Wkrs. U.*, Fla. 1962, 142 So. 2d 290.

[3] *Scherer & Sons, Inc.* v. *International Ladies' Gar. Wkrs. U.*, Fla. App. 1964, 163 So. 2d 306.

Appendix A

Opinion of District Court of Appeal—June 28, 1966—188 So. 2d 380

The cause then proceeded to final hearing. The chancellor entered a final degree in which he found that the equities are with the appellee and:

> "That the Plaintiff has proven the allegations of the complaint, as amended, by and with clear and convincing evidence.
>
> "That the Plaintiff, and his employees, by the acts complained of in the complaint, and the conduct stemming therefrom, have suffered loss of earning in business and as wages and have been irreparably injured.
>
> "That the concerted activities of the Defendants complained of in the complaint, and the amendment thereto, are in violation of the Florida Right to Work Amendment, as is set out in Section 12 of the Declaration of Rights of the Constitution of the State of Florida, in that the acts complained of and the contract which is the subject matter of this suit, constitute both primary and secondary economic pressures by the Defendants upon the Plaintiff for the purpose of compelling the Plaintiff to execute a contract with the Defendant Union(s) and/or to require the Plaintiff's employees to join said Union(s) as a condition of employment, even though none of the Plaintiff's employees are members of said Union(s), or, in the alternative to continue to suffer losses in its business with a likelihood of a cessation thereof, all of the above being within the purview of the law of the case in this cause of action, as is defined and set out in 142 So. 2d 290 and 163 So. 2d 306; see also *Hescom, Inc.* v. *Staley, etc.*, [Fla. App. 1963], 155 So. 2d 3.

Appendix A

Opinion of District Court of Appeal—June 28, 1966—
188 So. 2d 380

> "That the compulsive pressures brought to bear upon the Plaintiff, and its employees, by the Defendants, acting in concert, violate the Right to Work Amendment to the Constitution of the State of Florida, as aforesaid, and are tantamount to the taking of the Plaintiff's property without due process of law."

Based on these findings the chancellor permanently enjoined and restrained the appellants from violating Florida's right-to-work amendment found in § 12, Declaration of Rights, Florida Constitution, F.S.A. including, but not limited to, the enforcement of any agreement requiring the cessation of business with the appellee, Scherer & Sons. The chancellor further restrained all picketing in violation of § 12 above.

Having determined that the evidence supports the findings and that no error has been made to appear, the decree appealed is affirmed.

Affirmed.

Appendix A

Order of Circuit Court Denying Rehearing—April 6, 1965—Unreported

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

IN CHANCERY

No. 61C-1417 (Dekle)

SCHERER & SONS, INC., a Florida corporation,

Plaintiff,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, Local 415, et al.,

Defendants.

ORDER

THIS CAUSE came on duly for hearing before me, after notice, upon the Defendants' Petition for Rehearing and Motion to Vacate and Set Aside Final Decree. The Court heard arguments, considered memoranda of law submitted and the authorities cited by the respective parties.

Nellie Kitchens, et al. vs. *John Doe, et al.*, (Fla. App. 3, March 16, 1965) — So. 2d — (Opinion filed March 16, 1965, not yet reported) handed down after the entry of this Court's Final Decree of March 12, 1965, is urged by Defendants as decisive of this controversy and requiring

Appendix A

Order of Circuit Court Denying Rehearing—April 6, 1965—Unreported

that such Final Decree be set aside, and one entered for Defendants on the basis that the Taft-Hartley Act has preempted, to the exclusive jurisdiction of the National Labor Relations Board, the question(s) here as an unfair labor practice, on the ground that the right to work issue under Section 14(b) of Taft-Hartley begins only with actual negotiation and execution of the type of agreement described in Section 14(b), to-wit: "Agreements requiring membership in a labor organization as a condition of employment" as held in *Retail Clerks* v. *Schermerhorn*, 376 U.S. 96, 11 L. Ed. 2d 179, 84 S. Ct. 219.

It does not appear that the right-to-work question has been presented in just this light in any of the previous cases. *Nellie Kitchens* involves, as plaintiffs, the employees of the Plaintiff here, Scherer & Sons, Inc., and the picketing in question which was solely by members of Defendant Union, not employees of Plaintiff. The holding of the Third District rests squarely on its statement that in the *Nellie Kitchens* case ". . . there was no agreement in existence, nor was there any negotiation in regard thereto, it was simply an attempt *to get the employer to execute a union-security agreement*, . . ." There *is* present in evidence in this cause an agreement, in fact, agreements, which have the effect, under the proofs in evidence, of depriving the employees of this Plaintiff of the choice whether to join a union or not, as preserved in Florida's "right to work" law, which choice is recognized in *Schermerhorn*, supra. These agreements were between the Garment Workers' Union and apparel manufacturers in the Miami area as an Association, which is also a Defendant, and constituted a source of work done by the Plaintiff in the manufacture of belts, buttons and accessories for the

Appendix A

Order of Circuit Court Denying Rehearing—April 6, 1965—Unreported

products of such manufacturers, and thus, effectively eliminated work which the employees might do only if they conformed to the requirements of the agreements between the Association of Manufacturers and the Union that such products ". . . shall be made only by *workers* covered by collective bargaining agreements with the Union, the International or affiliates thereof." (Emphasis supplied) The agreements then continued: "In case a member of the Association shall have this work done by a non-Union shop, then, upon notification by the Union of this fact, the Employer shall discontinue to give out such work to such non-Union shop or shops." (Par. 6, p. 3, of Agreement, Pltf's. Ex. 4) Such provision expressly affects the "workers" or employees of the Plaintiff and, in effect, required that they belong to a union or no work would be received in the shop in which they worked and thus they were denied the right preserved by the Florida "right to work" law. The effectiveness of the agreement is demonstrated by the fact that this business quite literally became a "closed shop", without business and the employees without work.

This situation is referred to in the opinion of Justice Thornal in the prior appeal in this cause, *Scherer & Sons, Inc.* v. *International Ladies' Garment Workers' Union, et al.,* (Fla. 1962) 142 So. 2d 290, where he stated, at page 295:

> "It (plaintiff-employer) could be confronted by a situation where the only alternative to preserving itself against irreparable harm would be a compulsion to require its employees to join a union as a condition of employment. Such compulsive pressures would then squarely present the Florida "right to work" issue. Certainly, if this situation

> could be supported by evidence upon a remand, then the Taft-Hartley recognition of permissible state concern in the enforcement of its right to work provisions would support state action . . ."

The evidence in this cause certainly supports this situation.

Thus, it is seen that in the present case there is such an agreement referred to in the *Nellie Kitchens* case which distinguishes it and supports state action under the "right to work" law, consistent with the language of Mr. Justice Douglas in *Retail Clerks* v. *Schermerhorn*, supra, which is quoted in the Nellie Kitchens opinion, distinguishing picketing in order to *get* an employer to execute an agreement and one where an agreement is in existence. It is true that the agreement here referred to is not directly between this employer and the Union, but it need not be where the agreements that have been executed have the sam effect indirectly precluding the right of choice of Plaintiff's employees with regard to joining a union or not. This accomplished dilemma is set forth in Justice Thornel's earlier quoted language. To require, as a prerequisite to state action, the perfunctory execution of a union contract between this employer and this Union would be an idle and repetitious act. The result here is the same. The Union may be said to be doing indirectly that which the right to work law prohibits doing directly by such a "direct" agreement. It is very plain, from all of the foregoing, that these employees, by the Union's action and/or picketing, are being and/or would be compelled against their will to join a union in violation of the right to work issue. It is either that or no work.

Appendix A

Order of Circuit Court Denying Rehearing—April 6, 1965—Unreported

There is no specification as to between whom the agreements requiring membership in 14(b) of Taft-Hartley must be executed. Of concern to the Court is the effect of these upon the employees involved, and this effect is clear.

Accordingly, Defendants' Petition for Rehearing and Motion to Vacate and Set Aside Final Decree are denied and the Final Decree entered herein on March 12, 1965 is affirmed in all respects.

DONE and ORDERED at Miami, Dade County, Florida, this 6 day of April, 1965.

HAL P. DEKLE
Circuit Judge

Appendix A

Final Decree of Circuit Court—March 12, 1965—Unreported

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

IN CHANCERY No. 61C-1417 (Dekle)

SCHERER & SONS, INC., a Florida corporation,

Plaintiff,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, Local 415, et al.,

Defendants.

FINAL DECREE

The above cause came on for final hearing on Thursday, March 11, 1965, and the Court having heard the testimony, and being otherwise fully advised in the premises, finds:

1. That the equities in this cause are with the Plaintiff and against the Defendants, International Ladies' Garment Workers' Union, Local 415; International Ladies' Garment Workers' Union, AFL-CIO; Miami Joint Council of the International Ladies' Garment Workers' Union, AFL-CIO; all unincorporated voluntary associations; James Belluso, individually and as Business Agent of said International, and/or Local 415, and/or said Miami Joint Council; Harry Metz, individually and as Business Agent of said International and/or said Local 415, and/or said Miami Joint Council; Robert Gladnick, individually

and as Manager of said International and/or said Local 415, and/or said Miami Joint Council; and the Florida Apparel Manufacturers' Association, Inc., a Florida corporation.

2. That the Plaintiff has proven the allegations of the complaint, as amended, by and with clear and convincing evidence.

3. That the Plaintiff, and his employees, by the acts complained of in the complaint, and the conduct stemming therefrom, have suffered loss of earning in business and as wages and have been irreparably injured.

4. That the concerted activities of the Defendants complained of in the complaint, and the amendment thereto, are in violation of the Florida Right to Work Amendment, as is set out in Section 12 of the Declaration of Rights of the Constitution of the State of Florida, in that the acts complained of and the contract which is the subject matter of this suit, constitute both primary and secondary economic pressures by the Defendants upon the Plaintiff for the purpose of compelling the Plaintiff to execute a contract with the Defendant Union(s) and/or to require the Plaintiff's employees to join said Union(s) as a condition of employment, even though none of the Plaintiff's employees are members of said Union(s), or, in the alternative, to continue to suffer losses in its business with a likelihood of a cessation thereof, all of the above being within the purview of the law of the case in this cause of action, as is defined and set out in 142 So. 2d 290 and 163 So. 2d 306; see also *Hescom, Inc.* v. *Stalvey, etc.*, 155 So. 2d 3.

Appendix A

Final Decree of Circuit Court—March 12, 1965—Unreported

5. That the compulsive pressures brought to bear upon the Plaintiff, and (sic) its employees, by the Defendants, acting in concert, violate the Right to Work Amendment to the Constitution of the State of Florida, as aforesaid, and are tantamount to the taking of the Plaintiff's property without due process of law.

It is thereupon CONSIDERED, ADJUDGED, DECREED and ORDERED as follows:

1. That the Defendants, International Ladies' Garment Workers' Union, Local 415; International Ladies' Garment Workers' Union, AFL-CIO; Miami Joint Council of the International Ladies' Garment Workers' Union, AFL-CIO; all unincorporated voluntary associations; James Belluso, individually and as Business Agent of said International and/or said Local 415, and/or Miami Joint Council; Harry Metz, individually and as Business Agent of said International and/or said Local 415, and/or said Miami Joint Council; Robert Gladnick, individually and as Manager of said International and/or said Local 415, and/or said Miami Joint Council; and the Florida Apparel Manufacturers' Association, Inc., a Florida corporation, be, and they are hereby permanently enjoined and restrained from, in any manner, violating the Florida Right to Work Law(s), that is to say the provisions of Section 12 of the Declaration of Rights of the Florida Constitution appertaining thereto, including, but not limited to, the enforcement of any agreement, written, oral or otherwise, restraining or attempting to restrain the Plaintiff in its pursuit of business and its production, sale, use or consumption of merchandise, or from, in any manner enforcing an agreement, written, oral or otherwise, between the Defendants and other customers of the Plain-

tiff which requires the cessation of, or failure to do business with the Plaintiff.

2. That the Defendants, and each of them, be and they are hereby restrained from any and all picketing in violation of the provisions of the above and foregoing paragraph one (1) and/or in any violation of the provisions of Section 12 of the Declaration of Rights of the Constitution of the State of Florida pertaining to said Right to Work Law.

3. That the costs in this cause are taxed against the Defendants.

4. That the Court retains jurisdiction of this cause for the purposes of entering such further and other orders as it may deem meet and proper to enforce the provisions of this final decree and effect the purposes thereof.

DONE and ORDERED in Chambers at Miami, Dade County, Florida, this 12th day of March, 1965.

HAL P. DEKLE
Circuit Court Judge

Appendix A

Opinion of District Court of Appeal— April 14, 1964—163 So. 2d 306

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1964

CASE NO. 63–760

SCHERER & SONS, INC., a Florida corporation,

Appellant,

vs.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL 415; INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO: MIAMI JOINT COUNCIL of the INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO: all unincorporated voluntary associations; JAMES BELLUSO, individually and as Business Agent of said International, and/or said Local 415, and/or said Miami Joint Council; HARRY METZ, individually and as Business Agent of said International and/or said Local 415, and/or said Miami Joint Council; ROBERT GLADNICK, individually and as Manager of said International and/or said Local 415, and/or said Miami Joint Council; and the FLORIDA APPAREL MANUFACTURERS' ASSOCIATION, INC., a Florida corporation,

Appellees.

Appendix A

Opinion of District Court of Appeal—April 14, 1964—163 So. 2d 306

Opinion filed April 14, 1964.

An Appeal from the Circuit Court for Dade County, Hal P. Dekle, Judge.

Marchant, Perkins, Cook & Scheuerlein, for appellant.

Orr & Kaplan; Robert Cohn (Atlanta, Georgia); Harry B. Smith, for appellees.

Before BARKDULL, C. J., and CARROLL and HENDRY, JJ.

PER CURIAM.

Plaintiff appeals the dismissal of its amended complaint. The plaintiff filed its original complaint seeking injunctive relief against defendants-appellees for an alleged violation of the statute prohibiting agreements in restraint of trade resulting in injury to appellant. The trial court entered a temporary injunction order from which an appeal was taken to this court by the appellees. This court reversed the order appealed, and thereafter certified the question to the Supreme Court of Florida. The Supreme Court discharged the writ of certiorari and remanded the cause to this court for issuance of a mandate consistent with the Supreme Court's opinion which held:[1]

> ". . . [W]e feel that upon remand the appellant should be accorded an opportunity to establish by evidence the applicability of Florida's right-to-work amendment if it so desires and is in a position to do so."

This court filed an opinion in which it withdrew its earlier mandate, and amended its judgment and decision

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[1] *Scherer & Sons, Inc.* v. *International Ladies' G. Wkrs.*, Fla. 1962, 142 So. 2d 290, 295.

by adding thereto . . . "and the case is remanded to the circuit court for further proceedings in that court not inconsistent with its opinion and the opinion of the Supreme Court of Florida."[2]

Appellant filed an amended complaint as allowed, which appellees moved to dismiss. After argument the trial court dismissed the complaint, as amended, with prejudice.

The question for our determination is whether the trial court erred in failing to adhere to the decision of the Supreme Court of Florida in this case by dismissing the amended complaint. We hold that such dismissal was error.

The ruling of the Supreme Court became the "law of the case"[3] and the Circuit Court's dismissal of the complaint without affording appellant "an opportunity to establish by evidence" the allegations in the amended complaint was error.

We therefore reverse the order appealed and remand the cause for proceedings consistent herewith.

Reversed and remanded.

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[2] *International Ladies' G. Wkrs. U.* v. *Scherer & Sons, Inc.*, Fla. App. 1962, 146 So. 2d 137.

[3] *McGregor* v. *Provident Trust Co. of Philadelphia*, 119 Fla. 718, 162 So. 323; *City of Miami Beach* v. *Parking Facilities, Inc.*, Fla. App. 1960, 120 So. 2d 209; *Leybourne* v. *Furlong*, Fla. App. 1964, 161 So. 2d 221.

Appendix A

Opinion of Supreme Court of Florida—May 9, 1962—142 So. 2d 290

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1962

CASE NO. 31,484

SCHERER & SONS, INC., a Florida corporation,

Petitioner,

vs.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL 415; INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO: MIAMI JOINT COUNCIL of the INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO: all unincorporated voluntary associations; JAMES BELLUSO, individually and as Business Agent of said International, and/or said Local 415, and/or said Miami Joint Council; HARRY METZ, individually and as Business Agent of said International and/or said Local, and/or said Miami Joint Council; ROBERT GLADNICK, individually and as Manager of said International, and/or said Local 415, and/or said Miami Joint Council; and the FLORIDA APPAREL MANUFACTURERES' ASSOCIATION, INC., a Florida corporation,

Respondents.

Appendix A

Opinion of Supreme Court of Florida—May 9, 1962—142 So. 2d 290

Opinion filed May 9, 1962

Writ of Certiorari to the District Court of Appeal, Third District

Marchant, Perkins, Cook & Schenerlein, for Petitioner

Orr & Lazar and Robert Cohn (Atlanta, Georgia) for International Ladies' Garment Workers' Union, Local 415, et al and Harry B. Smith for Florida Apparel Manufacturers' Association, Inc., Respondents

THORNAL, J.

By a petition for a writ of certiorari we have for review a decision of a District Court of Appeal certified to us by that court as involving a question of great public interest.

We must determine whether, under the circumstances presented, state injunctive relief against a contract allegedly violative of Section 542.05, Florida Statutes, is precluded by the provisions of the Labor Management Relations Act, 1947, under the doctrine of preemption.

The decision which we have under review is *International Ladies' Garment Workers' Union, et al.* v. *Scherer and Sons, Inc.*, 132 So. 2d 359. Inasmuch as the matter is certified to us by the District Court of Appeal we may explore the entire record in arriving at our conclusion. Article V, Section 4, Florida Constitution; *Susco Car Rental System of Florida* v. *Leonard*, 112 So. 2d 832; *Carraway* v. *Revell*, 116 So. 2d 16.

The respondent International Ladies' Garment Workers' Union, Local 415, hereafter referred to as the Union, entered into a collective bargaining agreement with the respondent Florida Apparel Manufacturers' Association.

Appendix A

Opinion of Supreme Court of Florida—May 9, 1962—
142 So. 2d 290

The agreement, which was dated October 25, 1960, contained the following provisions:

> "Belts, covered buttons, buckles, neckwear, artificial flowers, embroideries, hemstitching, pleating and tucking on garments, etc., which are caused by members of the Association to be manufactured for them shall be made only by workers covered by collective bargaining agreements with the Union, the International, or affiliates thereof. In case a member of the Association shall have this work done by a non-Union shop, then, upon notification by the Union of this fact, the employer shall discontinue to give out such work to such non-Union shop or shops."

The membership of the Manufacturers' Association consists of thirty-six manufacturers of ladies' garments in the greater Miami area. Petitioner Scherer is engaged primarily in the business of manufacturing belts and accessories for such garments in the same area. For a number of years prior to the agreement in question members of the Manufacturers' Association had been customers of Scherer. Because of the provisions of the collective bargaining agreement, which we have quoted, these members of the Manufacturers' Association thereafter refused to do business with Scherer. They based their refusal upon the prohibitions of the Collective Bargaining Agreement executed with the respondent Union. Scherer operates a non-union shop. Contending that the agreement constituted an unlawful restraint of trade, violative of Section 542.05, Florida Statutes, Scherer requested and obtained a temporary injunction against the continued enforcement of the agreement. It alleged and the District Court found that it proved that irreparable injury resulted from the

agreement. The District Court of Appeal reversed the award of the injunction. It held in substance that the contract between the Union and Manufacturers' Association was arguably subject to condemnation as an unfair labor practice. It concluded that any state action thereon had been preempted by federal statutes even though the contract constituted a violation of the Florida Statute which prohibits such arrangements in restraint of trade. It is this decision which we must now consider.

Section 542.05, Florida Statutes, invalidates combinations in restraint of trade defined as follows, to wit:

> "Any person who shall or may become engaged in any combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons or of either two or more of them, for either, any or all of the following purposes:
>
> "(1) To create or carry out restrictions in trade or commerce or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state;
>
> "(2) To increase or reduce the price of merchandise, produce or commodities;
>
> "(3) To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce, or commodities, or to prevent competition in aids to commerce;
>
> "(4) To fix at any standard or fixture whereby its price to the public shall be in any manner controlled or established any article or commodity of

> merchandise, produce, or commerce intended for sale, use, or consumption in this state; or . . ."

The complaint for the temporary injunction was grounded entirely upon the alleged violation of the Florida Statute. The injunction was granted entirely on the theory that the statute had been violated. The Union defended against the injunction and obtained reversal in the District Court with the contention that the Federal Government had preempted the field of labor relations by the enactment of the Labor Management Relations Act, 1947, commonly known as the Taft-Hartley Act, Title 29 U.S.C.A. Sections 141 et seq. In particular, it was contended that the collective bargaining agreement entered into between the Manufacturers' Association and Union was at least arguably subject to condemnation as an unfair labor practice. Hence, it was asserted that the initial determination regarding the validity of the agreement rested with the National Labor Relations Board, rather than with the state courts. The pertinent provision of the Taft-Hartley Act, 29 U.S.C.A. Section 158(e), reads in part as follows:

> "(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible [sic] and void: . . . Provided

further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception."

The Union likewise contended that the collective bargaining agreement was at least arguably subject to the federal prohibitions against secondary boycotts contained in 29 U.S.C.A., Section 158 (b)(4)(ii)(B). The problem which we must resolve requires a decision as to whether the subject arrangement between the Union and the Manufacturers' Association is within the comprehension of the Taft-Hartley Act as a problem for initial consideration by the National Labor Relations Board. Otherwise stated, the Union here asserts that regardless of state legislation on the subject the power to regulate this particular type of contract has been preempted by the Congress.

Admittedly, many aspects of control of labor relations have been left to the states. It must be conceded, however, that where a given situation is "arguably subject" to the prohibitions or protections of the Taft-Hartley Act, the federal government has preempted state action, at

least to the extent of conveying to the National Labor Relations Board the initial jurisdiction to determine the applicability of the federal law.

We do not overlook the contention of petitioner Scherer to the effect that it is here seeking the protections of Florida's statute prohibiting restraints of trade independently of the federal statute. However, it is clear that in the area of labor relations, where an Act of Congress sufficiently expresses the purpose of subjecting a given situation to federal supervision thereby excluding initial state control, then any state regulation must give precedence to federal jurisdiction. This is so even though the matter which has been subjected to federal labor regulations might also be included in a related state concern evidenced by its restraint of trade statutes. *Weber* v. *Anheuser-Busch Inc.*, 348 U.S. 468, 75 S. Ct. 480, 99 L. ed. 546. Certain general principles have evolved in the decisions dealing with this subject. Among these are the following:

1. A state may not prohibit the exercise of rights which the Taft-Hartley Act protects.

2. A state may not assert its injunctive processes against "an unfair labor practice" defined by federal statutes.

3. A state may enforce its injunctive processes against conduct of a union which is neither protected nor prohibited by federal labor statutes.

Illustrative of the third category is mass picketing or picketing which creates a breach of the peace. If a given situation may reasonably be classified in the first and second categories then state jurisdiction must accede to the agency which Congress has selected for the initial deter-

mination of the issues. *Weber* v. *Anheuser-Busch*, supra; *Garner* v. *Teamsters, C. & H. Union*, 346 U.S. 485, 74 S. Ct. 161, 98 L. Ed. 228; *Local 24 of I.B. of T., C., W. & H.* v. *Oliver*, 358 U.S. 283, 79 S. Ct. 297, 3 L. Ed. 2d 312.

The District Court correctly concluded that the factual situation reflected by the instant complaint was arguably subject to the jurisdiction of National Labor Relations Board under Title 29 U.S.C.A., Section 158(e) which we have quoted above. This is so because conceivably the collective bargaining agreement between the Union and the Manufacturers' Association could be construed as an unfair labor practice or conversely as a protected arrangement under the "garment industry proviso" likewise announced in the same statutory provision. At least under the Taft-Hartley Act, the National Labor Relations Board would be the appropriate forum to determine initially the presence or absence of federal jurisdiction.

In the event that the National Labor Relations Board should disclaim jurisdiction, then under recent amendments to the Taft-Hartley Act, the state courts would be free to proceed. Title 29, U.S.C.A. Section 401 et seq, otherwise known as the Labor Management Reporting and Disclosures Act of 1959. See also Vanderbilt Law Review, Vol. 13, No. 1, page 416, December 1959. Congress has likewies recently provided an expeditious procedure for obtaining prompt advisory opinions of the National Labor Relations Board regarding its jurisdiction in a particular situation. 29 U.S.C.A. App. Section 101.39, et seq.

Appellant relies strongly on *United Construction Workers* v. *Laburnum*, 347 U.S. 656, 74 S. Ct. 833, 98 L. Ed. 1025, where the Supreme Court of the United States affirmed state court action in allowing damages for a common law tort resulting from Union action which threat-

ened violence incident to demands for a union shop. The decision turned on the proposition that the subject action was neither prohibited nor protected by the Taft-Hartley Act. It was subsequently construed to permit recovery for damages only as a result of conduct which otherwise would have been the subject of a state court injunction. This was the construction placed upon Laburnum in *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775. By Garmon it appears that the Supreme Court of the United States has limited the recovery of damages in state courts to those situations which would be subject to the states injunctive processes such as violent picketing.

Appellant also relies upon *International Union* v. *Wisconsin Employment Relations Board*, 336 U.S. 245, 69 S. Ct. 516, 93 L. Ed. 651, and, *Algoma Plywood and Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U. S. 301, 93 L. Ed. 691, 69 S. Ct. 584. In these cases, however, the state's injunctive processes were permitted against situations which were neither prohibited nor protected by the Taft-Hartley Act.

In its brief here appellant also asserts that the collective bargaining agreement collides with Florida's so-called "right to work amendment" found in Section 12, Declaration of Rights, Florida Constitution. This provision of the Florida organic law reads as follows:

> "The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."

Appendix A

Opinion of Supreme Court of Florida—May 9, 1962—
142 So. 2d 290

It is then contended that state jurisdiction is preserved by 29 U.S.C.A. Section 164 (b) which reads as follows:

> "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

Unfortunately for the appellant this aspect of the problem was neither urged by the complaint nor supported by the evidence presented to the chancellor on the application for the temporary injunction. Although the point was raised by a petition for rehearing in the District Court, it was not argued in the briefs nor supported by the record presented to that court.

Conceivably, the secondary economic pressures exerted upon appellant by the disputed provision in the collective bargaining agreement could force appellant into a dilemma which would be tantamount to a taking of its property without due process. It could be confronted by a situation where the only alternative to preserving itself against irreparable harm would be the compulsion to require its employees to join a union as a condition to employment. Such compulsive pressures would then squarely present the Florida "right to work" issue. Certainly, if this situation could be supported by evidence upon a remand, then the Taft-Hartley recognition of permissible state concern in the enforcement of its right-to-work provisions would support state action. In the area of protecting state policy under right-to-work provisions the Congress has expressly ceded initial jurisdiction to the states. Since

the matter was before the chancellor only upon an application for a temporary restraining order based upon the Florida restraint of trade statute, we feel that upon remand the appellant should be accorded an opportunity to establish by evidence the applicability of Florida's right-to-work amendment if it so desires and is in a position to do so. We, therefore, hold that when this cause is remanded to the chancellor it should be without prejudice to any rights of appellant in this regard.

We might interpolate that in this broad area of labor relations, unless state jurisdiction is clear, time, effort and money could be conserved by initially employing the expeditious procedure which the Congress has now established to obtain a preliminary determination of jurisdiction by the National Labor Relations Board. Subject to the privileges extended to appellant with reference to Florida's right-to-work amendment we hold that the decision of the Court of Appeal must be approved. We discharge the writ of certiorari but remand the cause to the District Court with directions to remand the same to the Circuit Court for further proceedings not inconsistent with this opinion.

It is so ordered.

ROBERTS, C.J., THOMAS, DREW, O'CONNELL and HOBSON (Ret.), JJ., and PARKS (Ret.), Circuit Judge, concur.

Appendix A

Opinion of District Court of Appeal— August 3, 1961—132 So. 2d 359

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1961
CASE NO. 61-147

INTERNATIONAL LADIES' GARMENT WORKERS UNION, et al.,
Appellants,

vs.

SCHERER & SONS, INC., a Florida corporation,
Appellee.

Opinion filed August 3, 1961.

An Interlocutory Appeal from the Circuit Court for Dade County, Hal P. Dekle, Judge.

Orr & Lazar and Richard Yale Feder, for appellants.

Marchant, Perkins, Cook & Schenerlein, for appellee.

Before PEARSON, CJ., and HORTON and CARROLL, JJ.

PER CURIAM.

The International Ladies' Garment Workers Union and The Miami Joint Council of International Ladies' Garment Workers Union, together with the Florida Apparel Manufacturer's Association, Inc., are defendants in the circuit court to a complaint by Scherer & Sons, Inc., a Florida corporation, wherein the plaintiff prays for damages against the defendants and an injunction to prevent the

defendants from enforcing any contract and entering into and agreeing to any agreement whereby the plaintiff is restricted in the full and free pursuit of its business. Scherer & Sons, Inc., identify themselves as a manufacturer of belts and accessories, contracted for and sold to dress manufacturers in the garment industry in Miami. The complaint alleged that the unions mentioned had entered into a contract with the Florida Apparel Manufacturer's Association, Inc. whereby the plaintiff, a non-union organization, was precluded from participating in business with the members of the apparel manufacturers association.

After notice and hearing, the chancellor entered a temporary injunction whereby the defendants were enjoined from enforcing any agreement: "restraining or attempting to restrain the plaintiff in its pursuit of business and its production, sale, use or consumption of merchandise or in any manner enforcing an agreement between the defendants and other customers of the plaintiff which requires the cessation of or failure to do business with the plaintiff." The basis of this temporary restraining order was that defendants' actions in attempting to enforce a contract between the unions and the apparel manufacturers whereby the apparel manufacturers would not purchase from any suppliers except union shops, was a restraint of trade and in violation of Section 542.05, Fla. Stat., F.S.A. Chapter 542, Fla. Stat., F.S.A., is entitled "Combinations Restricting Trade or Commerce."

The defendants have prosecuted this interlocutory appeal and we reverse, upon the ground that the conduct complained of presents a question of whether an unfair labor practice was committed and, as such, the decision thereon has been pre-empted by statutes of the United

Appendix A

Opinion of District Court of Appeal—August 3, 1961—132 So. 2d 359

States. There is no doubt but that the activity of the defendants, alleged in the complaint, and of which prima facie proof was made upon hearing, constitutes a violation of Florida Law. Nevertheless, it is our view that the particular activity of the defendants here complained of is within the area where Congress has seen fit to establish exclusive federal jurisdiction by Title 29, § 158(b) (4) (ii) (B), U.S.C.A. This is a section of the Taft-Hartley Act as amended in 1959. It is also our view that the specific activity here complained of is regulated further by an amendment which appears as Title 29, § 158(e), U.S.C.A. Appellee urges that the last mentioned section is relieved of its effect by an exemption contained in said section which excerpts from the operation thereof, "persons in the relation of a jobber, manufacturer, contractor or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of the integrated process of production in the apparel and clothing industry."

An examination of the pleadings and the evidence in this case reveals no ground for the application of the exception to the activity of which complaint is made, and it is not necessary for us to determine the effect of said exception if applicable. Because it has been made to fairly appear that the activities complained of constitute an unfair labor practice under the National Labor Relations Act the state jurisdiction must yield.[1]

Therefore, the temporary injunctive order appealed is reversed.

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[1] "When it is clear or may fairly be assumed that the activities which a State purports to regulate * * * constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 3 L. ed. 2d 775, 79 S. Ct. 773.

Appendix A

Kitchens Case Opinion of Supreme Court of Florida—November 9, 1966—194 So. 2d 258

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1966

CASE NO. 34,314

NELLIE KITCHENS, et al.,

Appellants,

vs.

JOHN DOE, et al.,

Appellees.

Opinion filed November 9, 1966

An Appeal from the District Court of Appeal, Third District

Joseph A. Perkins, for Appellants

Kaplan & Shapiro, for Appellees

PER CURIAM.

This appeal reflected apparent jurisdiction and the case was heard on oral argument of the parties. After hearing argument and upon further considering the matter, we have determined the appeal does not lie because we lack jurisdiction to consider it pursuant to Article V, Section 4, Florida Constitution. Therefore it is ordered this appeal be dismissed.

THORNAL, C.J., THOMAS, DREW and ERVIN, JJ., concur

ROBERTS, J., dissents with Opinion

O'CONNELL and CALDWELL, JJ., dissent

Appendix A

Kitchens Case Opinion of Supreme Court of Florida—November 9, 1966—194 So. 2d 258

ROBERTS, J., dissenting:

On direct appeal we here review a decision by the District Court of Appeal, Third District, affirming a judgment of the lower court which had dismissed a suit by the plaintiff-employees who were seeking protection for their right to work without joining a union, under Section 12, Declaration of Rights, Florida Constitution, popularly referred to as the "Florida Right to Work Law".

The factual background, history and disposition are clearly set forth in the opinion by the District Court reported at 172 So. 2d 896, and it would serve no useful purpose to repeat them here.

We have jurisdiction because the District Court of Appeal initially construed a controlling provision of the Constitution of Florida. Compare *Harrell's Candy Kitchen, Inc.* v. *Sarasota-Manatee Airport Authority,* 111 So. 2d 439.

The District Court held that the exclusive jurisdiction over the subject controversy had been reserved to the National Labor Relations Board citing *Retail Clerks Intern. Ass'n, etc.* v. *Schermerhorn,* 375 U.S. 96, 84 S. Ct. 219, 11 L. Ed. 2d 179, and lifted from that opinion the following language of Mr. Justice Douglas:—

> "On the other hand, picketing in order to get an employer to execute an agreement to hire all-union labor in violation of a state union-security statute lies exclusively in the federal domain [citations omitted] because state power, recognized by § 14(b), begins *only with actual negotiation and execution of the type of agreement described by § 14(b).* Ab-

sent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under Garmon." 375 U. S. at 105, 84 S. Ct. at 223.

In *Hescom, Inc.* v. *Stalvey*, Fla. App. 1963, 155 So. 2d 3, the District Court of Appeal, First District, had announced a ruling on comparable facts that the non-union employees would be entitled to protection in the Florida courts, under our Right to Work Law. The District Court of Appeal, Third District, in its opinion here under review, held the *Hescom* case to be overruled by the *Schermerhorn* case.

Section 14(b) of the Taft-Hartley Act, appearing as 29 U.S.C.A. § 164(b), provides:

> "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

The language above quoted by Mr. Justice Douglas and which was only a small part of the dictum in the *Schermerhorn* case, when read out of context with the entire opinion, might appear to support the ruling by the Third District Court in this case, but frankness compels me to say that I fail to see any logic in the contended pronouncement that there is a difference as to the forum for the enforcement of the Florida Right to Work Law, depending upon whether or not the non-union laborers are working with an agreement. In fact, I fail to glean from the record satisfactory evidence as to whether the non-

union employees do or do not have an employment agreement.

Section 12, Declaration of Rights, Florida Constitution, provides inter alia that:

> "• • • The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."

I have again read and considered the entire text of the *Schermerhorn* case, and it is my view that the above quoted language by Mr. Justice Douglas was not necessary to a decision of the matter pending before the Supreme Court of the United States and was merely a side thought—"on the other hand" etc.—and amounted to obiter dicta and as such is not binding on this court.

In the *Schermerhorn* case the Supreme Court of the United States said:

> "As already noted, under § 8(a)(3) a union-security agreement is permissible, for example, if the union represents the employees as provided in § 9(a) (subject to rescission of the authority to make the agreement as provided in § 8(a)(3)). Those are federal standards entrusted by Congress to the Labor Board. Yet even if the union-security agreement clears all federal hurdles, the States by reason of § 14(b) have the final say and may outlaw it. *There is thus conflict between state and federal law; but it is a conflict sanctioned by Con-*

gress with directions to give the right of way to state laws barring the execution and enforcement of union-security agreements. It is argued that if there is a violation of a state union-security law authorized by § 14(b), it is a federal unfair labor practice and that the federal remedy is the exclusive one. It is urged that that course is necessary if uniformity is to be achieved. But § 14(b) gives the States power to outlaw even a union-security agreement that passes muster by federal standards. Where Congress gives state policy that degree of overriding authority, we are reluctant to conclude that it is nonetheless enforceable by the federal agency in Washington." (Underscoring supplied.)

A contrary view or the view announced by the District Court of Appeal, Third District, would render sterile the Right to Work Law in Florida and would result in an odd situation where, by the decision of the United States Supreme Court and an Act of Congress, Florida has the right to have a Right to Work Law, but would not have the jurisdiction to protect persons claiming the right to work thereunder.

For the reasons stated I would quash the decision of the District Court of Appeal, Third District, with instructions to return the cause to the trial court with directions to proceed in a manner not inconsistent with this opinion.

I therefore respectfully dissent.

Appendix A

Kitchens Case Opinion of District Court of Appeal—March 16, 1965—172 So. 2d 896

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1965

CASE No. 64-523

NELLIE KITCHENS, et al.,

Appellants,

vs.

JOHN DOE, RICHARD ROE and THOMAS DOE, holding themselves out as constituting the International Ladies' Garment Workers' Union, Local 415, AFL-CIO, JAMES BELLUSO, individually and as acting manager and/or secretary and/or treasurer of Miami Joint Council, International Ladies' Garment Workers' Union, AFL-CIO, and/or business agent and organizer of Local 415; and HARRY METZ, individually, as business agent and/or organizer of the International Ladies' Garment Workers' Union, and Local 415 thereof, all unincorporated voluntary associations,

Appellees.

Opinion filed March 16, 1965.

An Appeal from the Circuit Court for Dade County, Francis J. Christie, Judge.

Marchant, Perkins, Cook & Schenerlein, for appellants.
Kaplan & Shapiro, for appellees.

Before BARKDULL, C.J., and TILLMAN PEARSON and HENDRY, JJ.

Appendix A

Kitchens Case Opinion of District Court of Appeal—March 16, 1965—172 So. 2d 896

HENDRY, Judge.

The plaintiffs-appeal from the summary final judgment granted to the defendant by the trial court.

The plaintiffs are most of the employees of Scherer & Sons, Inc., a Miami manufacturer of belts, buttons and accessories in the garment industry.[1] Defendants are various officials of Local 415 of the International Ladies' Garments Workers' Union.

The salient paragraph of the complaint charged the union with picketing the plaintiff's employer for the purpose of coercing them to join the union, which would be in violation of their rights under the Declaration of Rights to the Constitution of the State of Florida, Section 12, popularly known as the "right to work" law. In other words, the basis of the complaint was that the activity of the labor union was directed toward establishing a union-security agreement wherein the union would represent these plaintiffs, who had no desire to join the union. At the time of the filing of the complaint, a temporary injunction was granted which prohibited the union from picketing.

Both parties moved for a summary judgment, and the trial court granted defendant-union's motion for summary judgment as well as dissolving the temporary injunction against picketing.

The appellant asserts error on the part of the trial court in granting the defendant's motion based on the assumption that the trial court had no jurisdiction to act in this instance. The trial court evidently based its decision on the conclusion that this activity came within the proscription of the Taft-Hartley Act (29 U.S.C.), and

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[1] All of these employees are non-union.

Appendix A

Kitchens Case Opinion of District Court of Appeal—March 16, 1965—172 So. 2d 896.

therefore preempted the state court from consideration of the matter.

Appellant urges that this proposition is erroneous and cites in support thereof the Florida Supreme Court case of *Scherer & Sons, Inc.* v. *International Ladies' G. Wkrs.*, Fla. 1962, 142 So. 2d 290 wherein the court said:

> "Such compulsive pressures would then squarely present the Florida 'right to work' issue. Certainly, if this situation could be supported by evidence upon a remand, then the Taft-Hartley recognition of permissible state concern in the enforcement of its right-to-work provisions would support state action. In the area of protecting state policy under right-to-work provisions the Congress has expressly ceded initial jurisdiction to the states." 142 So. 2d at 295.

This decision by the Florida Supreme Court was based upon 29 U.S.C.A. § 165(b) which provides:

> "(b) Nothing in this sub-chapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

This section, which is popularly known as § 14(b) of the Taft-Hartley Act has been subsequently passed upon by the U. S. Supreme Court on the question of state-federal jurisdiction in this area.

In *Retail Clerks* v. *Schermerhorn*, 375 U.S. 95 (1963), the Supreme Court was determining the question of

Appendix A

Kitchens Case Opinion of District Court of Appeal—March 16, 1965—172 So. 2d 896

"'whether the Florida courts, rather than solely the National Labor Relations Board, are tribunals with jurisdiction to enforce the state's prohibition' against an 'agency shop' clause in a collective bargaining agreement."[2] The Court clearly set out the area of the respective authorities, when Mr. Justice Douglas wrote:

> "On the other hand, picketing in order to get an employer to execute an agreement to hire all-union labor in violation of a state union-security statute lies exclusively in the federal domain, [citations omitted] because state power, recognized by § 14(b), begins *only with actual negotiation and execution of the type of agreement described by § 14(b).* Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under Garmon[3] 375 U.S. at 105.

In applying the law of the land as promulgated by the U. S. Supreme Court in Schermerhorn, supra, to the facts of the instant case, we reach the result that the trial court correctly granted the defendant's motion for summary judgment.

In the Schermerhorn case the U. S. Supreme Court affirmed the Florida Supreme Court's ruling that the state court had authority where the agreement had *already been executed or negotiated.* In the present case, there was no agreement in existence nor was there any nego-

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[2] 375 U.S. at 97.

[3] *San Diego Council* v. *Garmon,* 359 U.S. 236 (1959).

tiation in regard thereto, it was simply an attempt to *get the employer to execute a union-security agreement*, and such activity was specifically reserved to the N.L.R.B. by the language of the Schermerhorn case. In Schermerhorn there was such an agreement already in existence and here there was simply an attempt to procure one. Therefore, the activity here involved was solely within the jurisdiction of the N.L.R.B., and the trial court correctly ruled.

The first district case of *Hescom* v. *Stalvey*, Fla. App. 1963, 155 So. 2d 3, decided on substantially similar facts to this one, must be deemed overruled by the later Schermerhorn case which reached a different result and specifically said that such activity was witihin the sole jurisdiction of the N.L.R.B.

In view of the above, the judgment appealed is affirmed.

Affirmed.

APPENDIX B

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8 (e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsec-

tion (e) and section 8 (b) (4) (B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

* * * *

Section 14. * * *

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

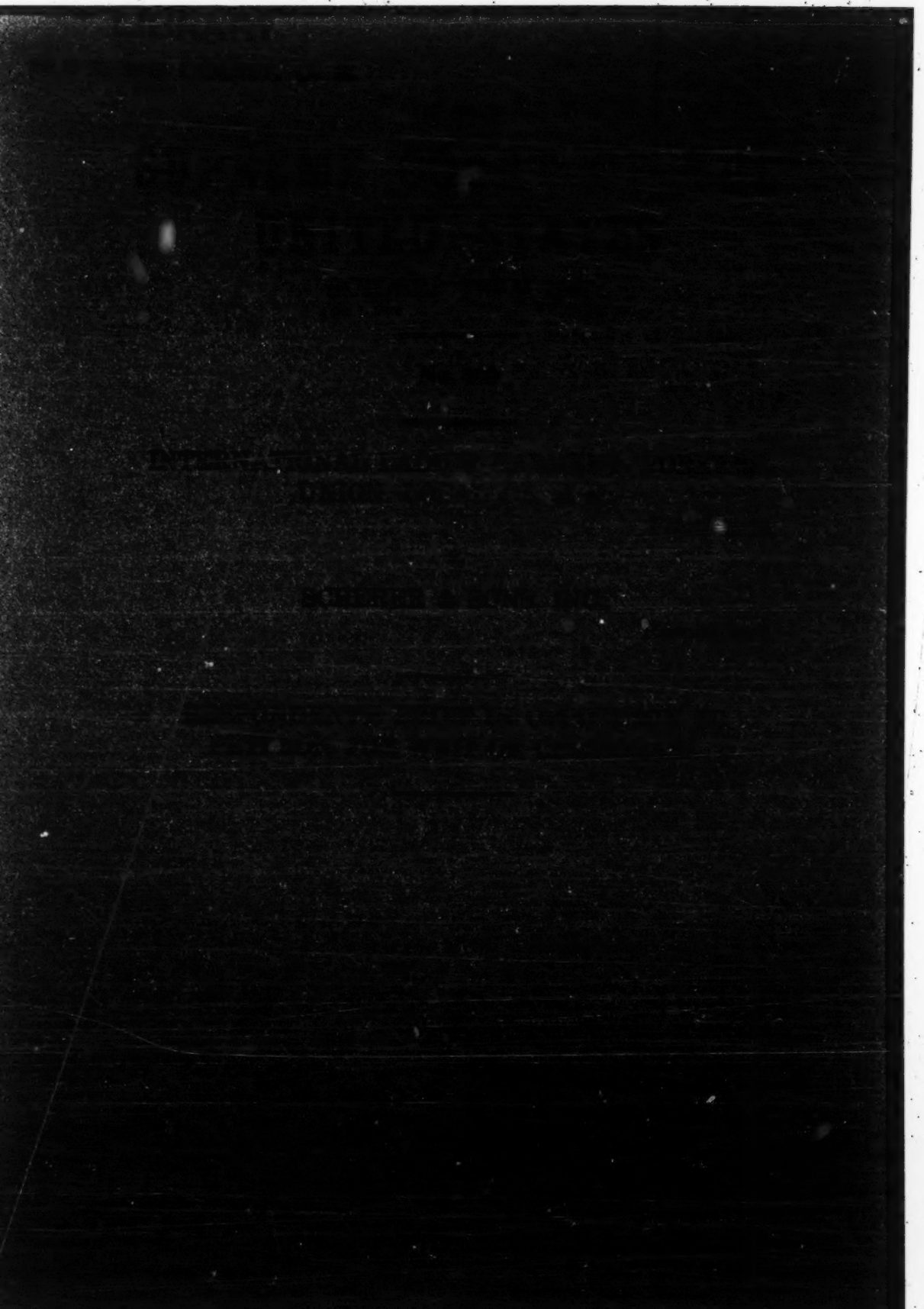
The pertinent provision of Section 12, Declaration of Rights, Florida Constitution, is as follows:

> The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

Appendix B

The pertinent provision of Article 5, Section 4, Florida Constitution, is as follows:

> Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.



TOPICAL INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement	3
Argument	7
Conclusion	19
Certificate of Service	19

CITATION OF AUTHORITIES

	Page
A. F. L. v. American Sash & Door Co. 335 U.S. 538, 68 S. Ct. 260	8
Algoma Plywood Co. v. Wisconsin Board 23 LRRM 2402, 336 U.S. 301, 69 S. Ct. 584, 93 L.Ed. 691	8
Allen Bradley v. Local 3, International Brotherhood of Electrical Workers, (1945) 325 U.S. 797	9
Employee Lithographers of Greater Miami v. National Labor Relations Board 301 F. 2d 20 (C.A. 5, 1962)	16
Hescom Inc., v. Stalvey, et al. Dist. Ct. of Appeal, First Dist. (Fla. June 25, 1963) 155 So. 2d 3	13
Kitchens, et al. v. John Doe, et al. (March 16, 1965) 172 So. 2d 896	6
Lincoln Federal Labor Union v. Northwest Iron & Metal 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212	7
Local Union 10, United Association of Plumbers v. Graham, 345 U.S. 192, 73 S. Ct. 585, 97 L. Ed. 946	8
Local Union No. 189, Amalgamated Meat Cutters, etc. v. Jewel Tea Company (1965) 85 S. Ct. 1596	8

CITATION OF AUTHORITIES (cont.)

	Page
Local No. 438 Laborers v. Curry, (1963) 83 S. Ct. 531	15
National Labor Relations Board, Petitioner v. International Union of Operating Engineers, Local Union No. 12, AFL-CIO, Respondent. 293 Fed. 2d 319 (C.A. 9)	10
NLRB v. Amalgamated Lithographers of America 309 F. 2d 31 (C.A. 9, 1962) cert. den. 372 U.S. (1963)	16
Retail Clerks International Association Local 1625 v. Schermerhorn 375 U.S. 96, 84 S. Ct. 219 (1963)	11
373 U.S. 746, 83 S. Ct. 1461 (1963)	12
Scherer & Sons, Inc. v. International Ladies' Garment Workers' Union, Local 415, et al. 142 So. 2d 290	2
Truck Drivers Local No. 413 v. N.L.R.B. 334 F. 2d 539 (C.A.D.C. 1964)	16
United Mine Workers of America, Petitioner v. James M. Pennington, et al. (1965) 85 S. Ct. 1585	8
Vegas Franchises, Ltd. v. Culinary Workers (Nevada, May 1967) (65 LRRM 2671)	8

CITATION OF AUTHORITIES (cont.)

	Page
Florida Statutes 447.01	App. 1
Florida Statutes 447.03	App. 1
Florida Statutes 447.09	App. 2
Labor Management Relations Act of 1947, as amended 29 U.S.C.A.	10
Constitution of the State of Florida, Section 12, Declaration of Rights	15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

No. 400

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL 415, et al.,

Petitioners,

v.

SCHERER & SONS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

The Order of Dismissal of the Supreme Court of Florida sought to be reviewed is contained in the Appendix A, page 1, attached to the petition.[1] (A:1) The Opinion of the District Court of Appeal (A:2-5) is reported

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[1]A — Appendix A to the Petition for Writ of Certiorari filed by the Union.

All reference to appendices, therefore, is reference to those attached to the Petition for Writ of Certiorari.

in 188 So.2d 380, while the earlier pertinent Opinion of the Supreme Court of Florida (A: 18-28) is reported in 142 So.2d 290.

The Final Decree of the Circuit Court (A: 11-14) and its Order Denying Rehearing (A: 6-10) are unreported.

Jurisdiction

The Order (A: 1) of the Supreme Court of Florida (infra, p.A:1) was entered February 20, 1967. Jurisdiction is invoked under 28 U.S.C. 1257(3).

Question Presented

May a non-union employer, pursuant to the right preserved by the Florida Right-to-Work law enjoin concerted activities (of a union and a union organized manufacturers' association) engaged in for the purpose(s) of

1. Compelling the employer to require its employees to join a union as a condition of employment;

and/or

2. (a) Compelling the discontinuance of business and commerce between the non-union employer and union organized manufacturers' association;

(b) Eliminating any non-union competi-

tion with the union organized manufacturers;

where the only alternative to 1 and/or 2, supra, is the ultimate forced cessation of its business, depriving the employer and employee(s) alike of their livelihood?

Statutes Involved

The pertinent provisions of the National Labor Relations Act and of the Florida Constitution are set forth in petitioner's Appendix B (B:1-14);[2] Pertinent references to portions of the Florida Statute regulating labor organizations (Florida Statutes 447) are contained in the Appendix attached hereto.

Statement

The trial court's findings (A:11-13) set out in the Final Decree (A:11-14), and re-confirmed in the Circuit Court Order Denying Rehearing (A:6-10) are virtually unchallenged by the petition(er).[3] Evidence adduced at the trial of this cause on the 11th day of March, 1965 reveals the following:

The defendants in this cause, the Union and the Florida Apparel Manufacturers' Association (which said Asso-

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[2]B = Appendix B to the Petition for Writ of Certiorari.

[3]The union does recite, at the bottom of page 3 of its brief. The Union demanded and secured this provision "to make sure that... working conditions are at a level which would "defend the standards of our members"... all this referring of paragraph 6 of the Supplemental Agreement (R. 23-26, 213-216, 250, 291).

ciation has long since abandoned any pretext of a defense to the activity complained of), entered into the agreement for the dual purpose of organizing Scherer & Sons, Inc., and of eliminating non-union competition with the defendant, Florida Apparel Manufacturers' Association (R: 356-358).[4] So testified Mel Warshaw (R: 355-365) who at times pertinent was a member of the Association (R: 355), and who further said that paragraph 6 of the agreement complained of was directed to Scherer & Sons, Inc. (R: 357)

Sol Meyerson, (R: 365-385), a member of the defendant Apparel Association (R: 366) related, with regard to paragraph 6 of the Supplement, that the purpose was, among other things, "to eliminate non-union competition" (R: 373), and that Scherer was "the prime objective of this particular clause"[5] (R: 369), stating, as well, that the purpose was for the unionization of all of Scherer's employees in order to get the shop not only unionized but to get the union's men's dues (R: 369). He participated in discussions with both the Association and the Union with regard to the purposes of paragraph 6 of the Supplement (R: 367, 368, 370, 376). Meyerson declared that the Association and the Union agreed to help each other organize Scherer (R: 376). He was personally instructed by the Union not to do business with Scherer & Sons, Inc. (R: 376-377; 380-385). Meyerson testified specifically:

> "The purpose of paragraph 6 was to get all of the employees of Scherer & Sons forced to become members of the Union." (R: 381)

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[4] R — Record on appeal.
[5] Paragraph 6 of the Supplement.

None of the above testimony taken at the trial of this cause was thereafter rebutted.

Joseph Scherer, president of Scherer & Sons, Inc. (R: 330-352) related how the company lost work and the employees lost jobs (R: 333) because of the Union activity; his employees were well qualified to do the work ordered until it was taken from him (R: 337). He told of the Union and the Association combining to organize his employees (R: 341); that such was the purpose of the agreement. The Respondent company, of course, was picketed and, of course, deliveries ceased because thereof (R: 353, 354)

Scherer & Sons, Inc. and its employees, because of the acts complained of and "the conduct stemming therefrom, have suffered loss of earning in business and as wages and have been irreparably injured". (A: 4, 12, 20).

The trial (R: 318-410) resulted in the entry, on March 12, 1965, of the Final Decree (A: 11-14) wherein the trial court found:

(1) The equities of the cause with Scherer and against the defendants (Union and Manufacturers' Association);

(2) Scherer proved the allegation of the complaint as amended by clear and convincing evidence;

(3) Scherer and its employees, because of the conduct of the Union and the Association, suffered economic loss(es) and have been irreparably injured;

(4) the concerted activities complained of and proven constitute both primary and secondary economic pressures for purpose of compelling Scherer to execute a contract with the Union and to require Scherer's employees to join the Union as a condition of employment even though no employee is a member of the Union.... all in violation of the Florida right-to-work law(s) as defined and set out in 142 So. 2d 290;

(5) the compulsive pressures brought upon Scherer and its employees by the Union and Association, acting in concert, are tantamount to the taking of Scherer's property without due process of law.

and permanently enjoined the Union and the Apparel Association from, in any manner, violating the provisions of the Florida Right-to-Work Law(s); the final decree enjoined picketing where, not as,[6] violative of the "right-to-work" provisions of the Florida Constitution.

The Petitioner, in its statement "argues" the Kitchens case[7] (A:37-41) which the trial court had before it, and distinguished, at the time (April 6, 1965) of the entry of its "Order Denying Rehearing" (A:6-10); the District Court of Appeal, on the appeal from the final decree (A:11-14), refused to hold this cause governed by its

[6]Petitioner recites on page seven (7) of its petition that the court "... enjoined peaceful picketing *as* violative of the" 'right-to-work' provision (infra pp. A:13-14)

[7]*Kitchens, et al.* v. *John Doe, et al.* (March 16, 1965), 172 So. 2d 896.

Kitchens' decision, by ignoring, and by silence effectively repudiating, the same, and held and "determined that the evidence supports the findings and that no error has been made to appear..." and affirmed the decree (A:5).

The Supreme Court of Florida at the time, February 20, 1967 (A:1), of the entry of the Order (A:1) appealed from had the benefit of the District Court's Kitchens' opinion, 172 So. 2d 896 (A:37-41)[3]

ARGUMENT

In its "Reasons for Granting the Writ" the Petitioner (Union) ignores the fact that this Court has long upheld the applicability (and constitutionality) of right-to-work laws in situations not unsimilar to the confronta-

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[3]Indeed, the Supreme Court of Florida, on *November 9, 1966,* in a 4 to 3 per curiam decision, 194 So. 2d 258 (A: 32-36) refused, on jurisdictional grounds, to hear an appeal from the District Court of Appeal's Kitchens decision. The Per Curiam decision (A:32) in its entirety recites: "This appeal reflected apparent jurisdiction and the case was heard on oral argument of the parties. After hearing argument and upon further considering the matter, we have determined the appeal does not lie because we lack jurisdiction to consider it pursuant to Article V, Section 4, Florida Constitution. Therefore, it is ordered this appeal be dismissed"; however, the minority, speaking through Mr. Justice Roberts (A: 33-36) believed the Court did have jurisdiction to review and should review Kitchens for as Mr. Justice Roberts said: "...the view announced by the District Court of Appeal, Third District, would render sterile the Right to Work Law in Florida and would result in an odd situation where, by the decision of the United States Supreme Court and an Act of Congress Florida has the right to have a Right to Work Law, but would not have jurisdiction to protect persons claiming the right to work thereunder" (A:36). Mr. Justice Roberts would quash the Kitchens decision (A:36); but, be that as it may, by the Order of February 20, 1967 (A:1) the Supreme Court of Florida lets stand and thereby re-affirms its *decision in 142 So. 2d 290 as the controlling law under the Florida Constitution,* Declaration of Rights (Right-to-Work Law) *and applicable in this cause.*

tion here. In 1949, the Supreme Court upheld the constitutionality of right-to-work laws in a decision dealing with the Nebraska and North Carolina laws and a separate decision on the Arizona law. (See **Lincoln Federal Labor Union v. Northwest Iron & Metal**, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, and **A. F. L. v. American Sash & Door Co.**, 335 U.S. 538, 68 S. Ct. 260, 93 L. Ed. 222.

Four years later the Supreme Court also held that peaceful picketing[9] to force a violation of state right-to-work laws may be enjoined by the state courts without infringing the free speech guarantee of the Fourteenth Amendment to the Constitution. **Local Union 10, United Association of Plumbers v. Graham**, 345 U.S. 192, 73 S. Ct. 585, 97 L. Ed. 946.

With respect to federal preemption in this field, the Court in 1949 upheld the jurisdiction of the Wisconsin Employment Relations Board to order an employer to cease and desist from giving effect to a maintenance-of-membership contract found to violate state law and to reinstate and give back pay to an employee discharged pursuant to the contract. (Algoma Plywood Co. v. Wisconsin Board, 23 LRRM 2402), 336 U.S. 301, 69 S. Ct. 584, 93 L. Ed. 691.

Consider the fairly recent **Pennington** and **Jewel Tea** anti-trust cases.[10] In the **Pennington** case the basic issue

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[9]See *Vegas Franchises, Ltd.* v. *Culinary Workers* (Nevada May 1967) (65 LRRM 2671) where peaceful picketing was enjoined under state right-to-work law.

[10]*United Mine Workers of America, Petitioner*, versus *James M. Pennington, et al. (1965) 85 S. Ct. 1585*, and *Local Union No. 189, Amalgamated Meat Cutters, etc.* versus *Jewel Tea Company* (1965) 85 S. Ct. 1596.

was whether the union could enter into a collective bargaining agreement with a multi-party bargaining unit regarding wages and, as a part of that agreement, undertake to impose the same standards on other small producers without regard to their ability to pay (the instant case). Mr. Justice White stated that the anti-trust laws applied to a conspiracy of employers and the union to eliminate competition based on sub-standard wages; the concurring opinion of Mr. Justice Douglas went even beyond the Mr. Justice White opinion. In Mr. Justice White's opinion he reasoned that a group of employers could not conspire to eliminate competitors, and the union was liable if it joined the conspiracy even though the union's part was to impose uniform wages on all the industry, and this opinion extends even the Allen Bradley decision (Allen Bradley v. Local 3, International Brotherhood of Electrical Workers, (1945) 325 U.S. 797, 65 S. Ct. 1533. In the case at bar the facts reveal that the Union and the Association mutually joined together in concerted action, if indeed not a conspiracy, far exceeding the requirements of either the Pennington, Allen Bradley or the Jewel Tea Company case(s), supra. The net result seems to be that an industry-wide agreement by union and employers setting up a wage structure (as perhaps at least inferred by Petitioner here) beyond the financial ability of an employer to pay and made to force employer(s) out of business is in itself a prima facie violation of the anti-trust laws. True these cases refer to federal anti-trust law(s) but it would logically follow that the principles pronounced therein would equally be applicable here and would not in any manner be preempted.

In National Labor Relations Board, Petitioner, v. International Union of Operating Engineers, Local Union

No. 12, AFL-CIO, Respondent, 293 Fed. 2d 319 (CA. 9), the Court of Appeals for the Ninth Circuit (Cal.) held **that an attempt to force one employer to sever business relations with another person is not protected by virtue of reliance upon a contract with employer.** This the Court did in construing the effect of Section 8(e), added by Section 704(b), Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 543; 29 U.S.C.A. Section 158 (e)).

Respondent points out that this case is of importance in that the Petitioner endeavors to contend and does contend that the Courts of the State of Florida have no jurisdiction, and said Petitioner, in support of its position, erroneously refers, as material, to so-called contractual provisions of the Taft-Hartley Law, the Petitioner more specifically assuming the following:

(A) Petitioner lends its contractual provision a legitimate error by asserting that it was arrived at by the collective bargaining process for the purpose of protecting wages, hours and working conditions of the employees whom the union represents (even though evidence in the record does not support such an assumption.)

(B) Petitioner contends that the subject matter herein is at least arguable within Section 8(e) of the Labor-Management Relations Act as Amended, 29 U.S.C.A. 158 (e), and therefore the Courts of Florida are precluded from acting in these matters (even though the Petitioner offers no evidence as to why it is arguable within this

Section of the Federal Act), the decision of the Supreme Court of Florida (142 So.2d 290) notwithstanding.

Assuming all of the arguments of the Petitioner are supported by evidence, they are to no avail as a defense to the Respondent's contention that the Petitioner has violated the law of the State of Florida and that the Courts of the State of Florida have jurisdiction. All of Petitioner's arguments are disposed of in the Operating Engineers case, supra, for in this case the union had a collective bargaining agreement with the employer wherein if the employer subcontracted work, said subcontractor must meet the terms of the collective bargaining agreement. The company then proceeded to subcontract work out, in violation of this agreement, to subcontractors who were non-union. The union then began activities with the object of causing the company to cancel its work with the subcontractors. The Court held that Section 8(e) of the Federal Act "does not legalize strikes or other coercive action to enforce such clauses." (Underscoring ours) And further, "An attempt to enforce one employer to sever business relations with another person is not protected by virtue of a reliance upon a contract with an employer."

Examination of this cause and the Petitioner's own authorities make obvious the correctness of the decision in 142 So. 2d 290. An examination of the case of Retail Clerks International Association Local 1625 v. Schermerhorn, 375 U.S. 96, 84 S. Ct. 219 (1963) reveals, as is set out in Syllabus (1) on page 219 thereof, that the sole question therein was whether the Florida courts, rather than solely the National Labor Relations Board, are tribunals with jurisdiction to enforce the states prohibition against an

"agency shop" clause in a collective bargaining agreement, the Supreme Court of the United States having earlier, in the same action, 373 U.S. 746, 83 S. Ct. 1461 (1963) declared that Section 14(b) of the National Labor Relations Act subjected an agency shop agreement to state substantive law, saying, in effect, that 14(b) removes the protection of the Section 8(a)(3) proviso of the Taft-Hartley law, that is to say, the protected feature of the Act.

The recital, by Mr. Justice Douglas in the second Schermerhorn case, supra, that "state power" recognized by Section 14(b) begins only with actual negotiations and execution of the type agreement described by Section 14(b) is as stated by Mr. Justice Roberts (A:34) "only a small part of the dictum" (underscoring ours) in Schermerhorn and the "quoted language" by Mr. Justice Douglas was not necessary to a decision of the matter pending before the Supreme Court of the United States and was merely a side thought — 'on the other hand' etc. — and amounted to obiter dicta and as such is not binding on this Court."

Respondent points out the contention that there are agreements, executed by this Petitioner (Union) and others, which directly affect the rights of Respondent and its employees. But more important, Mr. Justice Douglas further wrote (immediately following the above quoted portion of the decision):

> "Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under Garmon." (Underscoring ours).

The Supreme Court of the State of Florida, in construing right-to-work laws and the exemption provided by 29 U.S.C.A. 164(b), held in this case (142 So.2d 290) that the conduct complained of and occurring was neither protected nor prohibited by federal statutes (A:24, 27). A more concise and accurate and lucid construction of the controlling provisions of the Florida Constitution and the exemption provided by Section 14(b) of the Labor Management Relations Act of 1947 as amended, has never heretofore been stated.

It is obvious that the activities of the Union (and the Association) are/were for the purpose of coercing the Respondent's employees to join the Union, as well as coercing and intimidating the employer to force the employees to join the Union, against their will, and to deny unto *all* the right to work because of no contract and because the employees are not members. In short, Respondent says that the Union was attempting, among other things, to require the Respondent to discharge (fire) the employees if they did not join the Union with or without regard to the execution of any contract.

Petitioner attempts to make light of the decision in Hescom, Inc. v. Stalvey, et al. District Court of Appeal, First District (Fla. June 25, 1963) 155 So. 2d 3, in view of the pronouncement by the District Court of Appeal, Third District, supra, ignoring completely that by holdings subsequent to the Kitchens opinion the District Court of Appeal for the Third District of Florida and the Supreme Court of the State of Florida has in fact, at least by indirection, adopted the principles in 142 So. 2d 290 and negated Kitchens. The law in Hescom, supra, was good law when decided and is good law now and the Court, there, speak-

ing through Mr. Justice Wigginton, on page 9 of its decision (referring to the Schermerhorn case, supra) stated:

> "The rationale of the foregoing decision is to hold that a labor union may not do indirectly that which the law prohibits it from doing directly. By analogy we are impelled to conclude in the case now before us that the defendant union may not through the technique of peaceful picketing precipitate a condition which by indirection has the effect of forcing an employer to enter into a collective bargaining agreement with it and compel its employees to join the union against their will, an objective which the rulings of our Supreme Court have held to be illegal as violative of an individual's right to work in a lawful occupation or trade. As said by the Supreme Court in the Paramount Enterprises case:
>
> > "Personal liberty and private property are fundamental rights in this country. The very purpose of law is to protect these rights. Any unlawful interference with them by false statement, acts of coercion, intimidation, malice or covert implications that threaten mischief or injury to them may be enjoined.
> >
> > "To judicially sanction the act of a labor organization which by premeditated design either directly or indirectly denies a person the right to work because of his non-membership in a labor union would negate and render impotent the

> guarantees contained in Section 12 of the Declaration of Rights of our State Constitution. Any such rule of law would be contrary to the public policy of Florida as determined by its citizens and their duly elected representatives in the State Legislature." (Underscoring ours)

Moreover, Judge Dekle, the trial judge in the case at bar, stated: *"It does not appear that the right-to-work question has been presented in just the light*[11] *in any of the previous cases."*

Respondent has always contended that any construction/interpretation of our right-to-work law(s) where picketing is for the reason stated by Mr. Justice Thornal (A: 18-28) is in no way dependent upon, nor requires the use of, 14(b), 29 U.S.C.A. 164(b), nor for that matter, any interpretation relied upon by the Petitioner in the Schermerhorn case(s), nor the case of Local No. 438 Laborers v. Curry (1963) 83 S. Ct. 531, for this cause need not necessarily be concerned in the final analysis with contracts, union security agreements, hiring hall activities, and the ilk. Respondent claims that 14(b) should not be equated with our constitutional Amendment and says that resort to 14(b) is not even needed to give sanctity to our "Right-to-Work" law(s); Florida's constitutional amendment became effective long before the passage of the Labor Management Relations Act of 1947, as amended (Taft-Hartley Law). When the Court concluded, in construing our right-to-work law(s) together with the exemption provided by 29 U.S.C.A. 164(b), that the conduct complained of here, is neither protected nor prohibited by

[11]The Court is obviously referring to the portion of Judge Thornal's opinion in 142 So. 2d 290 relative to the irreparable harm resulting from compulsion to require employees to join the Union.

the federal labor statutes, it could well have reached, and should now reach and recite, the same conclusion without reference/resort to 14(b) either as a crutch or otherwise, or in any manner. So even without 14(b), the result should be as claimed by the Respondent.

As for the exemption granted this Union, in 1959, by Section 8(e) of the National Labor Relations Act it is but necessary to point out that two of the Union's citations[12] in support of its position are based solely upon the case of **Employee Lithographers of Greater Miami v. National Labor Relations Board,** 301 F. 2d 20 (C.A. 5, 1962) which this Respondent discussed at great length in a petition filed by the Respondent in this Court in 1965 (the same being Case No. 188 - October Term 1965) which this, the Supreme Court of the United States, declined to grant; Respondent claimed then, and claims now, that a ruling on the constitutionality of this exemption or, more specifically, a determination of the illegality of proviso/exemption granted the garment workers in 8(e), was unnecessary to a determination of the issues involved in these three (3) cases (as the Court obviously recognized in the **Employee Lithographers** case, supra, by the use of its words "in the meantime"). In fact, the Court there construed the hot cargo provisions of the Taft-Hartley Act and held the following:

> "We hold that the exemption does not deny due process under the Fifth Amendment to the members of the union here. It may be that the lithographic workers can make a case for exemption

[12] *NLRB* v. *Amalgamated Lithographers of America,* 309 F. 2d. 31 (C. A. 9, 1962) cert. den. 372 U. S. (1963); *Truck Drivers Local* No. 413 v *NLRB,* 334 F. 2d 539 (C.A.D.C. 1964).

but that is a matter that addresses itself under our system of government of the wisdom of the Congress. In the meantime, we preserve the prescription of the statute, and the exemption to the garment workers." (Emphasis ours.)

But most importantly the Fifth Circuit was not confronted, as in this case, with the head on collision where an "employer" directly is denied guaranteed constitutional rights **in a confiscatory manner in violation of due process.** Needless to say, this Respondent has previously sought, in Petition No. 188, a determination of the constitutionality of the exemption provided for the garment industry under Section 8(e) of the Taft-Hartley Act (the same being question number 3 presented in the Petition.) It is the **position of the Respondent that Section 8(e) was unconstitutional then and is unconstitutional now,** and should be so held if this Court determines 8(e) in any way adversely affecting Respondent; an additional proviso in Section 8 of the Labor Management Relations Act of 1947, as amended, recites **"that nothing in this subsection shall set aside the final proviso as to Section 8(a)(3) of this Act"** referring to "that nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception." Respondent points out that the Florida "Right-to-Work" law is not "in this Act" and that said last proviso is ineffective with regard to the provisions of Section 12, Declaration of Rights, Florida Constitution (B: 3) which reflects the public policy (see Appendix hereto) of the State of Florida.

Overlooked, as well, was the fact that there exists no labor dispute, either in the classical, traditional or any

other sense (nor is what occurred in this cause a labor dispute by definition in/by either the Taft-Hartley, Wagner, Norris-La Guardia, Mediation or any other law, or decision thereunder) a labor dispute being defined by Section 2(9) of the Act (29 U.S.C.A. 152(9) as:

> "(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

None of the Respondent's employees engaged in the picketing or a strike by reason of the picketing. The Union has never been certified nor recognized as the bargaining agent for the Respondent's employees at the time of the picketing or any other time. No employee ceased work as a result of the picketing. Further, the Union disavows that the purpose of the picketing was for organization or recognition purposes.

See Petition for Writ of Certiorari No. 1397, October Term 1966, also denied by this Court, of which Respondent requests this Court to take judicial notice.

CONCLUSION

For the reasons above stated, certiorari should be denied.

Respectfully submitted,

JOSEPH A. PERKINS
M-107 Biscayne Building
Miami, Florida 33130
(Attorney for Respondent)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari have been furnished to MORRIS P. GLUSHIEN, General Counsel, International Ladies' Garment Workers' Union, AFL-CIO, 1710 Broadway, New York, New York 10019, and HERBERT L. KAPLAN, ESQ., 1674 Meridian Avenue, Miami Beach, Florida 33139, Counsel for Petitioners, by mail this 7th day of December, 1967.

JOSEPH A. PERKINS

APPENDIX

Florida Statutes, 447.01: Regulating labor unions; state policy

(1) Because of the activities of labor unions affecting the economic conditions of the country and the state, entering as they do into practically every business and industrial enterprise, it is the sense of the legislature that such organizations affect the public interest and are charged with a public use. The working man, unionist or nonunionist, must be protected. The right to work is the right to live.

(2) It is here now declared to be the policy of the state, in the exercise of its sovereign constitutional police power, to regulate the activities and affairs of labor unions, their officers, agents, organizers and other representatives, in the manner, and to the extent hereafter set forth.

Florida Statutes, 447.03: Employees' right of self-organization.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining **or other mutual aid or protection.** (Underscoring ours).

Florida Statutes, 447.09: Right of franchise preserved; penalties.

It shall be unlawful for any person:

* * * * (3) To participate in any strike, walkout, or cessation of work or continuation thereof without the same being authorized by a majority vote of the employees to be governed thereby; provided, that this shall not prohibit any person from terminating his employment of his own volition.

* * * * (11) To coerce or intimidate any employee in the enjoyment of his legal rights, including those guaranteed in the § 447.08, or to intimidate his family, picket his domicile or injure the person or property of such employee or his family.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL 415, ET AL. *v.* SCHERER & SONS, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 400. Decided April 22, 1968.

PER CURIAM.

The mandate of this Court in this case issued on the 9th day of February 1968, is hereby recalled and the judgment heretofore entered on the 15th day of January 1968, is hereby vacated. The order of the Court dated the 15th day of January 1968, granting the writ of certiorari to the Supreme Court of Florida, is vacated.

Treating the papers submitted as a petition for a writ of certiorari to the District Court of Appeal of Florida, Third District, the petition for a writ of certiorari is granted and the judgment is reversed. *Retail Clerks International Assn.* v. *Schermerhorn*, 375 U. S. 96 (1963); *Local No. 438* v. *Curry*, 371 U. S. 542 (1963).

MR. JUSTICE BLACK and MR. JUSTICE HARLAN would set this case for oral argument.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL 415, ET AL. *v.* SCHERER & SONS, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 400. Decided January 15, 1968.

PER CURIAM.

The petition for a writ of certiorari to the Supreme Court of Florida is granted. The judgment below is reversed. *Retail Clerks International Assn.* v. *Schermerhorn*, 375 U. S. 96 (1963); *Local No. 438* v. *Curry*, 371 U. S. 542 (1963).

MR. JUSTICE BLACK and MR. JUSTICE HARLAN would set this case for oral argument.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.